

2020 Election Rules

Add the following as a new Note 5, on page 358:

In 2019, the NLRB released a set of new election rule that would roll back many of the 2014 changes. At that time, the 2014 rules appeared to have a fairly modest impact on union elections. The time from an election petition to the election itself went down a modest two weeks or so (about 37 days to 22.5 days) in uncontested elections and down about three weeks in contested elections (about 59 days to 35.5 days). Similar modest reductions occurred for certification. Moreover, the 2014 rules reduced elections with major (more than 100 day) delays to about only 10% of all cases.

When then the Board issued the 2019 rules it did not use the notice-and-comment process required of formal rulemaking, arguing that such a process was not necessary because the changes only affected internal agency processes. The AFL-CIO disagreed and sued to challenge the rules. A federal district court ruled that some of the rules were only procedural and could proceed without notice-and-comment, while others impacted parties' substantive rights and were therefore stuck down. *See Am. Fed'n of Lab. & Cong. of Indus. Organizations v. NLRB*, 466 F. Supp. 3d 68 (D.D.C.), *order amended on reconsideration*, 471 F. Supp. 3d 228 (D.D.C. 2020). As a result of this decision, some of the more significant changes to the 2014 election rules are as follows:

- The deadline for pre-election hearings goes from 8 *calendar* days after an election petition is filed to 14 *business* days, with the possibility that the time may be extended.
- The deadline for employers to post election notices goes from 2 business days to 5 business days.
- The deadline for statements of positions from non-petitioning parties' (that is, employers in new elections and unions in decertification elections) goes from around 7 *calendar* days to 8 *business* days after the region issues a notice of a hearing.
- Parties' have right to file post-hearing and pre-election briefs, which was eliminated as a matter of right in 2014. The briefs are due no less than 5 business days after a hearing and can be extended to 10 business days.
- Unlike under the 2014 rules, regions will not automatically impound contested ballots until issues are resolved.

The attempted changes blocked by the court were:

- The regions would have had to address questions regarding eligible votes and bargaining unit determinations in a pre-election hearing, rather than a post-election hearing as was required under the 2014 rules. This change would have provided more opportunity to delay elections by raising issues early in the process.
- The regions would have have normally scheduled elections no earlier than 20 *business* days after an election order, unless parties' consent to a faster timetable.
- The deadline for *Excelsior* lists (would have moved from 2 business days to 5 business days.
- The regions would not certify election results if there was a pending request for review. This would have allowed additional opportunities for delay by the party dissatisfied with the election result.